

decided that he should be paid \$1,000 a month as managing director with effect from 1st March. That was the position when the board at its seventh meeting agreed to the execution of the 1955 agreement on 26th September: the appellant was being paid \$1,000 a month as managing director but he had been paid nothing for all he had done during the seven months between the incorporation of the company and 1st March, 1955. Then on 5th September, 1956, at the fourteenth meeting of the board, the appellant's appointment as managing director was changed to that of chief engineer and his remuneration as such was fixed at \$2,000 a month which he received till he was dismissed on 28th March, 1957.

In all this it is difficult to see anything inconsistent with or indeed having any bearing upon the board's having agreed to accept the appellant's right to enforce directly the company's liability under the 1954 agreement in return for his services as consulting engineer.

There is one other point. At the eighth meeting of the board on 1st March, 1956, when the company was in financial difficulties but when the directors were well aware that the appellant was being paid a salary of \$1,000 a month as managing director he informed the board that he would accept his 1% tribute under the 1955 agreement on the basis that it should be calculated on the f.o.b. price of the ore less export duty and the expenses of barge transport to the ships on which it was exported. There is, however, nothing to show that this offer was accepted and it is difficult to see why the appellant should be held to it now.

That only leaves the question of the counter-claim. This is without substance. In the first place at the material time the appellant was not managing director. In the second place there is not a scrap of evidence to show that anybody was ignorant of or required reminding of the existence of the 1955 agreement. It had been drawn up by the company's legal adviser who was acting for the company in the litigation with the third parties; it was recorded in the minutes of the board's meeting held on 26th September, 1955; and it was frequently discussed at subsequent meetings as something that might be standing in the way of the company obtaining financial assistance. In the third place it is clear from the evidence that the appellant was excluded from the discussions that led up to the consent order. And in the fourth place if it had been overlooked that fact did not affect the company's position *vis-a-vis* the third parties, because the liability of the company to the appellant was to pay the tribute provided for by the 1954 agreement. The only difference made by

A the 1955 agreement was to make that payment directly enforceable by the appellant himself. In the circumstances the company is clearly entitled to indemnity as claimed by them at the hands of the third parties by reason of the consent order of 27th March, 1957.

B In all the circumstances I am of the opinion that in these proceedings the appellant should recover the amount of his tribute as at the date of the writ, that amount to be ascertained on enquiry by the Registrar if it cannot be agreed, and that in the meantime a receiver should be appointed as prayed.

C I would allow the appeal with costs.

Barakbah C.J. (Malaya) and Tan Ah Tah F.J. concurred.

Appeal allowed.

Solicitors: Donaldson & Burkinshaw; Skrine & Co.; Murphy & Dunbar.

OFFICIAL ASSIGNEE v. LIAN HONG & ORS.

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and Tan Ah Tah F.J.) June 1, 1964]

E [K.L. — Federal Court Civil Appeal No. 77 of 1963]

Bankruptcy Ordinance, 1959, s. 74 — Action against Official Assignee — Action on contract with bankrupt.

F Section 74 of the Bankruptcy Ordinance, 1959, provides in effect that no action shall be maintained against the official assignee in respect of anything done or intended or omitted to be done under the provisions of the Ordinance until the expiry of one month after notice in writing has been served on the official assignee clearly stating the cause of action and the name and address of the plaintiff; and such action shall be commenced within one year of the accruing of the cause of action. In this case the plaintiffs commenced proceedings against the official assignee for specific performance of an agreement for the sale of a piece of land made between them and the person who was later adjudicated a bankrupt.

G Held: an action based on the omission of the bankrupt before he was adjudicated a bankrupt to perform the terms of a contract does not fall within the category of actions dealt with by section 74 of the Bankruptcy Ordinance, 1949, and can be brought without notice being given and without the period of limitation.

Cases referred to:—

- H (1) *Midland Railway Co. v. Withington Local Board* 11 Q.B.D. 788.
 (2) *Lyles v. Southend-on-Sea Corporation* [1905] 2 K.B. 1, 14.
 (3) *Bradford Corporation v. Myers* [1916] 1 A.C. 242, 258.
 I (4) *Brocklebank Ltd. v. The King* [1925] 1 K.B. 52, 66 and 69.

FEDERAL COURT.

Au Ah Wah (Federal Counsel) for the appellant.

F. Keith Sellar for the respondents.

Thomson L.P.: This appeal raises a short point regarding the interpretation of a section of the Bankruptcy Ordinance.

On 11th May, 1963, the plaintiffs commenced proceedings against the official assignee for specific performance of an agreement for the sale of a piece of land in Johore made on 15th August, 1961, between them and one Ng Kee Phoon who was later adjudicated a bankrupt on 27th May, 1962.

The official assignee took out a summons asking that service of the writ on him and all subsequent proceedings be set aside on the ground that the plaintiffs had not complied with the provisions of section 74 of the Bankruptcy Ordinance (No: 20 of 1959) in that they had not served upon him a month's notice in writing of their intention to issue the writ and in that the action had not been commenced within a year of the accruing of the cause of action.

Azmi J. dismissed this application and against that decision the official assignee has now appealed.

The whole question turns on the interpretation of section 74 of the Bankruptcy Ordinance, the material portions of which read as follows:—

"(1) Save as provided by this section no action or process shall be maintained or served on the Official Assignee or on any person acting under his direction or control in respect of anything done or intended or omitted to be done under the provisions of this Ordinance until the expiry of one month after notice in writing has been served on the Official Assignee or such person clearly stating the cause of action and the name and address of the intended plaintiff

.....
 (2) Every such action shall be commenced within one year of the accruing of the cause of action and not afterwards.
"

That section is almost word for word the same as section 264 of the Public Health Act, 1875, which was later replaced by the somewhat differently worded section 1 of the Public Authorities Protection Act, 1895.

We are not here concerned with the merits of the plaintiffs' claim and indeed for the purposes of the present case it may be assumed that it is without merit. If that assumption is correct they will, of course, pay the usual penalty. The question here, however, is not whether the claim has merits but whether it is to be allowed to proceed to trial and that would seem to be entirely a matter of construction of section 74.

Azmi J. took the view that some meaning had to be attached to the words "in respect of anything done or intended or omitted to be done

A under the provisions of this Ordinance" and indeed it is clear that if it were not for these words no action of any sort could be commenced against the Official Assignee without giving a month's notice and so forth. The presence of these words, however, makes it plain that it was the intention of the legislature that actions against the official assignee should be divided into two classes; those which require notice and attract a period of limitation of one year and those which do not.

As always the question is where is the line to be drawn?

C Here it seems to me the plaintiff's action is based on the omission of the bankrupt before he was adjudicated to perform the terms of a contract of which he was accordingly in breach. That is not an omission in respect of something to be done by the official assignee under the Bankruptcy Ordinance. It is an omission to comply with obligations under a contract. It follows, therefore, that an action based upon it falls within the category of actions that can be brought against the official assignee without notice being given and within the ordinary period of limitation.

E I find support for that view in certain observations by Brett M.R. in the case of *Midland Railway Co. v. Withington Local Board* ⁽¹⁾ where he said with reference to section 264 of the Public Health Act, 1875:—

"It has been contended that this is an action in contract, and that whenever an action is brought upon a contract, the section does not apply. I think that where an action has been brought for something done or omitted to be done under an express contract, the section does not apply; according to the cases cited an enactment of this kind does not apply to specific contracts. Again, when goods have been sold, and the price is to be paid upon a *quantum meruit*, the section will not apply to an action for the price, because the refusal or omission to pay would be a failure to comply with the terms of the contract and not with the provisions of the statute."

G These observations were later mentioned with approval by Vaughan Williams L.J. in the case of *Lyles v. Southen-on-Sea Corporation*, ⁽²⁾ by Lord Atkinson in the case of *Bradford Corporation v. Myers* ⁽³⁾ and by Bankes L.J. and Scrutton L.J. in the case of *Brocklebank, Ltd. v. The King*. ⁽⁴⁾

I would dismiss the appeal.

Barakbah C.J. (Malaya) and Tan Ah Tah F.J. concurred.

Appeal dismissed.

I Solicitors: *Sault, Keith Sellar & Co.*